88-1153

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No. _____

The Supreme Court of the United States of America

OCTOBER TERM, 1988

W. W. RODGERS AND SONS PRODUCE, INC.,
W. W. RODGERS AND SONS PROPERTIES, INC.,
W. W. RODGERS AND SONS FRUITS AND VEGETABLES, INC.,
APPLE TRUCKING, INC., LETTUCE INVEST, INC.
AND ROY DOUGLAS RODGERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT EDWIN DAVIS

DAVIS, MEADOWS, OWENS,
COLLIER & ZACHRY
3700 First RepublicBank Plaza
901 Main Street
Dallas, Texas 75202
(214) 744-3700
Counsel for Petitioners

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Fifth Circuit err in refusing to address Petitioners' appeal on the ground that the mere authorization of a federal grand jury precludes appellate review of the district court's Order denying Petitioners' Rule 41(e) Motion for the Return of Seized Property?

2. Did the Court of Appeals for the Fifth Circuit err by holding that 28 U.S.C. § 1331 does not provide the district court with federal question jurisdiction of a Rule 41(e) motion?

PARTIES TO THE PROCEEDINGS BELOW

1. W. W. Rodgers & Sons Produce, Inc.;
2. W. W. Rodgers & Sons Properties, Inc.;
3. W. W. Rodgers & Sons Fruits and Vegetables, Inc.;
4. Apple Trucking, Inc.;
5. Lettuce Invest, Inc.;
6. Roy Douglas Rodgers;
7. Barton Bros. Produce;
8. Michael J. Barton;
9. Roger Sutton; and
10. United States of America.

Petitioners W. W. Rodgers & Sons Produce, Inc., W. W. Rodgers & Sons Properties, Inc., W. W. Rodgers & Sons Fruits and Vegetables, Inc., Apple Trucking, Inc., Lettuce Invest, Inc. and Roy Douglas Rodgers are affiliates. The Petitioners have no other parent companies, subsidiaries or affiliates.

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No.

The Supreme Court of the United States of America

October Term, 1988

W. W. Rodgers and Sons Produce, Inc.,
W. W. Rodgers and Sons Properties, Inc.,
W. W. Rodgers and Sons Fruits and Vegetables, Inc.,
Apple Trucking, Inc., Lettuce Invest, Inc.
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Petitioners,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, dismissing Petitioners' appeal, is the unpublished opinion *In Re: Search Warrant Issued July 14, 1987,* 857 F.2d 790, No. 88-1355 (5th Cir. Sept. 2, 1988), and the Fifth Circuit opinion denying Petitioners' Petition for Rehearing is the unpublished opinion *In Re: Search Warrant Issued July 14, 1987,* No. 88-1355 (5th Cir. Sept. 28, 1988). Those opinions of the Fifth Circuit Court of Appeals are reproduced in Appendices A and B, respectively, to this Petition. The two Memorandum

Opinion and Orders dated February 11, 1988 and May 9, 1988 of the district court for the Northern District of Texas are consolidated in the reported decision *In Re: Search Warrant Issued July 14, 1987*, 684 F. Supp. 1417 (N.D. Tex. 1988). The decision of the district court for the Northern District of Texas is reproduced in Appendix C to this Petition.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in this case was entered on September 2, 1988. Following an extension granted by the Fifth Circuit Court of Appeals, a Petition for Rehearing was timely filed by Petitioners on September 16, 1988, and was overruled by the Court of Appeals on September 28, 1988. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution — Amendment IV. (See Appendix D.)

28 U.S.C. § 1331. (See Appendix E.)

Rule 41(e) of the Federal Rules of Criminal Procedure. (See Appendix F.)

STATEMENT OF THE CASE

1. THE ISSUANCE AND EXECUTION OF THE WARRANT.

Petitioner W. W. Rodgers & Sons Produce, Inc. (the "Company") is the largest distributor of wholesale produce in the north Texas area. The Company has been in the

wholesale produce business for over 40 years, and primarily sells to large grocery chains such as Tom Thumb, Minyards, Kroger, Skaggs, etc. Petitioner Roy Douglas Rodgers is the Company's chief executive officer and the remaining Petitioners are affiliates of the Company.

On July 14, 1987, the Honorable William F. Sanderson, Jr., United States Magistrate for the Northern District of Texas, issued a search warrant authorizing the search for and seizure of a large variety of the Company's business records. Additional search warrants were issued for the search of Barton Bros. Produce and the persons of Roy Douglas Rodgers and Franklin Barton. The IRS investigation was not the result of a prior civil examination of the Petitioners. Indeed, they first learned of the IRS's interest in their affairs on July 21, 1987 when the search warrants were executed.

IRS Special Agent Charles D. Holmes was the affiant whose affidavit formed the sole basis for the issuance of the search warrants. Special Agent Holmes based his affidavit in part on information supplied by an alleged confidential informant.

There are no allegations in either the search warrant or the supporting affidavit that the Company's business is not legitimate. Neither was it even suggested that the Company is involved with drugs, organized crime, or some other illicit enterprise. Rather, the Holmes affidavit makes three general allegations of criminal tax activity: (1) that Roy Douglas Rodgers, Roger Sutton, and Franklin Barton "skimmed" currency from the sale of second-line produce from the Company to Barton Bros.; (2) that Roy Douglas Rodgers "laundered" currency through an unidentified banker in Rockwall, Texas; and (3) that the Company paid "kickbacks" to three specifically named produce buyers. The affidavit asserts that these activities and the documents to be seized were evidence of criminal tax violations, specifically

tax evasion (26 U.S.C. § 7201) and the making of a fraudulent or false return (26 U.S.C. § 7206(1)).

On July 21, 1987, approximately 32 armed IRS Special Agents (the "Agents"), some of whom carried multiple firearms and wore "flak jackets," conducted simultaneous searches of the Company's wholesale produce business and the business premises of Barton Bros. Produce, which is located across the street from the Company. The Agents spent approximately 6½ hours at the Company's place of business.

Upon entering the business, the Agents took control of the premises, sealed off all of the doors and posted guards to prevent anyone from entering or leaving the premises. The Agents not only refused to allow anyone to enter the building, they also prohibited those seeking admission to speak with the Company's personnel. In addition, the Agents seized control of and disconnected all of the Company's business telephones.[1]

The Agents instructed some of the Company's employees to cease working and forced them to leave the business premises. Other of the Company's employees were directed to remain at their work stations and respond to the Agents' questions. Several of the Company's employees were not only instructed not to leave the premises, but were also

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[1] All of the Company's telephones were disconnected and guarded by the Agents. Some of the Company's telephones in one room were subsequently reconnected so that certain employees could respond to incoming watts line calls from produce drivers in California; however, the Agents insisted that they be in the room and listened to the employees' side of any incoming calls. From time to time, incoming calls were picked up by the Agents who, without speaking, then hung up so that no conversation could take place between the Company and any outside caller.

interrogated by the Agents without being advised about their constitutional rights in the manner approved of in *Miranda v. State of Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

When the Agents served the warrant on Roy Douglas Rodgers, he requested that he be allowed to speak with an attorney. The Agents refused his request and began interrogating him. They gave him no advice regarding his "Miranda" rights until he finally asked if he had "any rights at all." After denying Mr. Rodgers' repeated requests, the Agents finally allowed Mr. Rodgers to contact his attorney after admonishing him that his retention of a qualified tax attorney would be an indication of guilt. However, the Agents refused to permit Mr. Rodgers to conduct a private conversation with his attorney on the telephone. Mr. Rodgers' request that his attorney be permitted to enter the premises in order to give him legal advice was also denied.[2]

At the conclusion of the search, the Agents seized two truckloads of the Company's business records and related documents. The seized items included over 20 attorney-client files, 17 four-drawer file cabinets and their contents, employee personnel files, medical records, vehicle lists, records regarding personal property, and various personal documents belonging to the Company's employees which were manifestly not described in the search warrant.

2. PETITIONERS' RULE 41(e) MOTION.

On August 8, 1987, W.W. Rodgers & Sons Produce, Inc., W.W. Rodgers & Sons Properties, Inc., W.W. Rodgers & Sons

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[2] The Company's legal counsel, Mr. Richard Johnson, testified that he requested access to the Company's premises during the search and seizure, but was told by the Agents that he would not be admitted.

Fruits and Vegetables, Inc., Apple Trucking, Inc., Lettuce Invest, Inc. and Roy Douglas Rodgers (the "Petitioners") filed motions seeking an order pursuant to Fed. R. Crim. P. 41(e) directing that all records and other property seized pursuant to the search warrant be returned. Their basis for the motion was that the search and seizure was illegal and in violation of Petitioners' constitutional rights in the following particulars: (1) the purpose and execution of the search and seizure was improper; (2) the search warrant was issued without sufficient evidence of probable cause; (3) the search warrant was impermissibly general and exceeded the scope of any probable cause established by the supporting affidavit; and (4) the search and seizure exceeded the scope of the search warrant. Rule 41(e) motions were also filed on behalf of Barton Bros. Produce, Franklin Barton, J. Michael Barton and Roger Sutton.

3. THE OCTOBER 2, 1987 HEARING.

On October 2, 1987, the district court for the Northern District of Texas convened a hearing pursuant to Rule 41(e) to receive evidence on any issue of fact necessary to the decision of Petitioners' Rule 41(e) motion. At that hearing, Petitioners began introducing testimony and other evidence to substantiate the allegations set forth in their motion. The hearing was not concluded on that date but was continued by the Court pending completion of a more detailed index of the property seized and further briefing by the parties with respect to the proper scope of the hearing.

4. THE GRAND JURY.

On November 17, 1987, some six weeks after the first hearing and before the Judge had scheduled a second one, the government filed a "Motion for Indefinite Stay." The government advanced as its sole ground for its motion that a

federal grand jury investigation "has now been authorized" to investigate potential criminal liability of certain of the Petitioners. The government argued that, because it had seen fit to authorize a federal grand jury, Petitioners' Rule 41(e) motion should be stayed until after the grand jury had concluded its investigation.

5. THE DISTRICT COURT'S FEBRUARY 11, 1988 MEMORANDUM OPINION AND ORDER.

In a Memorandum Opinion and Order issued on February 11, 1988, *In Re: Search Warrant Issued July 14, 1987*, 684 F. Supp. 1417 (N.D. Tex. 1988) (Appendix C), the district court ruled that it only had jurisdiction to act upon a Rule 41(e) motion pursuant to its anomalous jurisdiction. Further, the court held that it could not exercise its anomalous jurisdiction unless Petitioners could plead a colorable claim of irreparable injury, although Petitioners asserted that federal question jurisdiction existed for their Rule 41(e) motion pursuant to 28 U.S.C. § 1331.

The district court granted Petitioners twenty days to amend their pleadings to include a claim of irreparable injury. Because of its ruling on Petitioners' Rule 41(e) motion, the court did not address the government's Motion for Indefinite Stay.

On March 11, 1988, Petitioners timely filed their Amended Motion for the Return of Seized Property. In their Amended Motion, Petitioners again asserted two independent jurisdictional bases for their action: (1) federal question jurisdiction pursuant to 28 U.S.C. § 1331, and (2) the district court's anomalous jurisdiction. Petitioners' principal argument was that it is not necessary to demonstrate irreparable injury to establish jurisdiction in the district court to entertain the Rule 41(e) motion. Pleading in the alternative, Petitioners

alleged, *inter alia*, that they had suffered irreparable injury due to the threat of criminal prosecution and violation of their constitutional rights.

6. THE DISTRICT COURT'S MAY 9, 1988 MEMORANDUM OPINION AND ORDER.

Following the filing of Petitioners' Amended Motion for Return of Seized Property, the district court issued its Memorandum Opinion and Order dated May 9, 1988, *In Re: Search Warrant Issued July 14, 1987*, 684 F. Supp. 1417 (N.D. Tex. 1988) (Appendix C), denying Petitioners' Rule 41(e) motion. In its Order, the district court reaffirmed its Memorandum Opinion and Order dated February 11, 1988 and held that federal question jurisdiction pursuant to 28 U.S.C. § 1331 was inapplicable to Petitioners' Rule 41(e) motion. The court further concluded that a colorable showing of irreparable injury must first be pled for a district court to exercise its anomalous jurisdiction. Finally, the district court held that Petitioners had failed to plead a colorable claim of irreparable injury.

7. THE COURT OF APPEALS' SEPTEMBER 2, 1988 ORDER.

On appeal, the Court of Appeals for the Fifth Circuit dismissed Petitioners' appeal of the district court's orders citing this Court's opinion in *Di Bella v. United States*, 369 U.S. 121, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1962). The Fifth Circuit concluded that Petitioners' Rule 41(e) motion was tied to a criminal prosecution *in esse* because a federal grand jury had been authorized to investigate alleged criminal conduct of certain of the movants below. It therefore held that an appeal was precluded by the second prong of the *Di*

Bella two-prong standard for the appealability of pre-trial motions for the return of seized property.[3]

The Court of Appeals specifically acknowledged that a district court's order denying a Rule 41(e) motion on jurisdictional grounds is immediately appealable in the Fifth Circuit pursuant to *Richey v. Smith*, 515 F.2d 1239 (5th Cir. 1975). Nevertheless, it found that the district court did not dismiss Petitioners' Rule 41(e) motion "wholly or even partially on jurisdictional grounds," but, rather, denied their Rule 41(e) motion because Petitioners failed to make a colorable showing of irreparable injury. *In Re: Search Warrant Issued July 14, 1987*, 857 F.2d 790, No. 88-1355, slip op. at 2, Appendix A at A-2, n. 1 (5th Cir. Sept. 2, 1988).

REASONS FOR ALLOWING THE WRIT

This case involves a rare confluence of several factors which make review of the decision of the court of appeals by this Court necessary. First, the Opinion and Judgment of the Court of Appeals for the Fifth Circuit in this case is in direct conflict with the decisions of at least four other courts of appeals and is inconsistent with earlier decisions of this Court with respect to the appealability of pre-trial motions for the return of seized property. Second, the Fifth Circuit Opinion and Judgment cannot be reconciled with the plain language of Rule 41(e) which provides for a pre-indictment vehicle to obtain the return of illegally seized property. Third, the Opinion and Judgment of the Court of Appeals, by refusing to address Petitioners' appeal and thus implicitly

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[3] This Court held in *Di Bella* that an order denying a Rule 41(e) motion to return property is appealable "(o)nly if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." *Di Bella*, 369 U.S. at 131-132, 82 S. Ct. at 660.

affirming the district court's orders, is in direct conflict with 28 U.S.C. § 1331 which, following Congress' removal of the amount-in-controversy requirement, provides a district court with federal question jurisdiction to entertain a Rule 41(e) motion. Finally, this case squarely presents legal issues which are of fundamental and continuing importance to the rights of citizens to be secure in their possessions and free from the threat of unreasonable search and seizures. Only a definitive decision by the Court in this case can resolve the uncertainty created by the ruling of the Court of Appeals for the Fifth Circuit.

ARGUMENT

I. INTRODUCTION

Fed. R. Crim. P. 41(e) was adopted by this Court and enacted by Congress to provide citizens with a pre-trial forum to address alleged violations of their Fourth Amendment rights. Because the hearing on Petitioners' Rule 41(e) motion was continued by the district court pending completion of a more detailed index of the property seized and further briefing by the parties with respect to the proper scope of the hearing, all of the IRS's conduct with respect to the search and seizure is not yet before the district court. Nevertheless, if the Opinion of the Fifth Circuit Court of Appeals goes unchallenged, the government will be able to effectively foreclose the availability of any relief pursuant to Rule 41(e), and contrary to the intent of this Court and Congress in adopting Rule 41(e), prevent any movant from obtaining a pre-trial forum to address the merits of an illegal search and seizure.

Petitioners' Rule 41(e) motion was dismissed by the district court solely on jurisdictional grounds. The district court found that federal question jurisdiction pursuant to 28 U.S.C.

§ 1331 was unavailable in a Rule 41(e) context. It further held that Petitioners could not demonstrate irreparable injury and thus enable the district court to exercise its anomalous jurisdiction because the Internal Revenue Service had offered to provide Petitioners with copies of the seized documents.

If writ of certiorari is not granted in this case and the decision of the Fifth Circuit Court of Appeals is left standing, the IRS will be able to bar access to judicial relief pursuant to Rule 41(e), no matter how blatant its violations of a citizen's constitutional rights might be, simply by: (1) agreeing at the district court level to return copies of illegally seized documents thereby preventing that court's anomalous jurisdiction because no irreparable injury could be shown; and (2) forever precluding a decision on the merits of the Rule 41(e) motion by immediately convening a grand jury investigation. If this becomes the law, all citizens face the prospect of asking, as did Mr. Rodgers in this case, if they "have any rights at all."

II. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND IS INCONSISTENT WITH DECISIONS OF THIS COURT.

In *Di Bella v. United States*, 369 U.S. 121, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1962), this Court established a two-prong standard for the appealability of pre-trial motions for the return of seized property. *Di Bella* held that only if the motion: (1) is solely for the return of property; and (2) is in no way tied to a criminal prosecution *in esse* against the movant can the motion for the return of property be regarded as an independent action subject to appellate review prior to any possible criminal trial. This Court also found that there exists a

criminal prosecution *in esse* only "when at the time of ruling there is outstanding a complaint, or a detentional release on bail following arrest, or an arraignment, information, or indictment." *Di Bella*, 369 U.S. at 131, 82 S. Ct. at 660.

In *Di Bella*, and in the companion case *United States v. Koenig*, 369 U.S. 121, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1962), the petitioners filed motions to suppress the evidentiary use of material allegedly procured by unreasonable searches and seizures. Although the motions were filed prior to the return of any indictment, in both cases indictments were returned against the petitioners prior to the district courts' rulings on the motions. This Court held that because "at the time of ruling" indictments had been returned, the district courts' orders were interlocutory and not final decisions subject to appellate review. *Di Bella*, 369 U.S. at 131, 82 S. Ct. at 660.

In contrast to the factual pattern in *Di Bella*, no information or indictment has even now been returned against any of the Petitioners in this case. However, the Court of Appeals for the Fifth Circuit held that the mere authorization of a federal grand jury to investigate possible criminality on the part of certain of the Petitioners constitutes a criminal prosecution *in esse*. It therefore concluded that the second prong of *Di Bella* robbed it of jurisdiction to review the district court's order. It should be noted that the Fifth Circuit made no finding with respect to the first prong of *Di Bella*. *In Re: Search Warrant Issued July 14, 1987*, 857 F.2d 790, No. 88-1355, slip op. at 3, Appendix A at A-2 (5th Cir. Sept. 2, 1988).

There currently exists a split of authority among the circuit courts of appeals as to whether the government's act of authorizing a grand jury precludes appellate review of a Rule 41(e) order under *Di Bella*. The Sixth, Seventh, Eighth and Tenth Circuits have held that it does not constitute a criminal prosecution *in esse*. Those circuits impose the additional

requirement of the return of an information or indictment before the criminal process shifts from the investigatory to the accusatory stage.[4] Conversely, the First, Second, Third, Fourth, Fifth, Ninth and Eleventh Circuits have held that the mere existence of a grand jury constitutes a criminal prosecution *in esse*.[5]

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[4] *Sovereign News Co. v. United States*, 690 F.2d 569, 571 (6th Cir. 1982), *cert. denied*, 464 U.S. 814, 104 S. Ct. 69, 78 L. Ed. 2d 83 (1983) (existence of a grand jury does not render a Rule 41(e) motion interlocutory and a criminal prosecution is not "in being" if it is still in the investigatory stage); *Matter of 949 Erie Street, Racine, Wis.*, 824 F.2d 538, 549 (7th Cir. 1987) (a Rule 41(e) motion is not tied to a criminal prosecution "until the criminal process shifts from investigatory to accusatory; that is, until charges have been filed against the movant"); *In Re Search Warrants (Executed on Jan. 23, 1983)*, 750 F.2d 664, 667 (8th Cir. 1984) (the existence of a criminal prosecution is determined "from the indictment for purposes of Rule 41(e) appealability") *Gottone v. United States*, 345 F.2d 165 (10th Cir. 1965), *cert. denied*, 382 U.S. 901, 86 S. Ct. 234, 15 L. Ed. 155 (1965) (in the context of the Rule 41(e) motion, no criminal case *in esse* existed because movant was not under arrest "nor is an information or indictment outstanding against him").

[5] *Angel-Torres v. United States*, 712 F.2d 717, 719 (1st Cir. 1983) (empaneling a grand jury shifts the process from an investigatory to an accusatory stage for purposes of a Rule 41(e) motion); *Church of St. Matthew v. United States*, 845 F.2d 418, 419 (2d Cir. 1988) (denial of a Rule 41(e) motion is not a final order where the movant is the subject of a grand jury inquiry); *United States v. Furina*, 707 F.2d 82, 84 (3rd Cir. 1983) (existence of a grand jury investigation constitutes a criminal prosecution *in esse* for purposes of a Rule 41(e) motion); *United States v. Regional Consulting Services*, 766 F.2d 870, 874 (4th Cir. 1985) (there exists a criminal prosecution *in esse* when a grand jury investigation is presently ongoing concerning a Rule 41(e) movant); *United States v. Glassman*, 533 F.2d 262, 263 (5th Cir. 1976) (for purposes of a Rule 41(e) motion, a criminal prosecution *in esse* may exist prior

The split of authority among the circuit courts of appeals as to the appealability of a Rule 41(e) motion has existed for many years. At least eleven circuit courts of appeals have expressly ruled on the issue. As a result, it is apparent that no uniform treatment of the issue will be formulated by the circuits. It is therefore clear that the courts of appeals now require guidance from this Court to formulate a consistent rule as to the effect of the existence of a grand jury upon the appealability of a Rule 41(e) motion.[6]

Petitioners assert that the circuit courts of appeals which have ruled that the convening of a grand jury does not constitute a criminal prosecution *in esse* have correctly followed this Court's holding in *Di Bella*. That holding plainly differentiated between cases in which there only exists an investigation of alleged criminal activity and those cases in which the criminal process has shifted to the accusatory stage and the Rule 41(e) movants have been subject to either arrest, information or indictment.

> When at the time of ruling there is outstanding a complaint, a detention or release on bail following arrest, or

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to indictment); *Church of Scientology of California v. United States*, 591 F.2d 533, 535 (9th Cir. 1979), *cert. denied*, 444 U.S. 1043, 100 S. Ct. 729, 62 L. Ed. 729 (1980) (criminal prosecution *in esse* exists as a result of a grand jury investigation in the context of a Rule 41(e) motion); *In Re Grand Jury Proceedings*, 831 F.2d 222, 224 (11th Cir. 1987) (Rule 41(e) motion brought by the target of a grand jury investigation is merely a step in the criminal case preliminary to trial).

[6] Writ of certiorari was denied in three of the conflicting decisions set forth in footnotes 3 and 4. However, since certiorari was last denied in 1983, a majority of the circuit courts of appeals have definitively ruled on this issue. It is therefore apparent that a consistent rule will not be achieved by additional opinions of the courts of appeals absent a decision by this Court.

> an arraignment, information or indictment — in each such case the order on a suppression motion must be treated as "but a step in the criminal case preliminary to the trial thereof."

Di Bella, 369 U.S. at 131, 82 S. Ct. at 660, quoting *Cogen v. United States*, 278 U.S. 221, 227, 49 S. Ct. 118, 120 (1928).

The petitioners in *Di Bella* and *Koenig* had been arrested, arraigned and indicted prior to the district courts' rulings on their motions for the return of property. This Court held that the district court orders with respect to those motions were interlocutory and not immediately appealable because the criminal process in those cases had already shifted from the investigatory to the accusatory stage.

Conversely, Petitioners herein have not been arrested, arraigned or indicted. Although the government authorized a federal grand jury in November 1987, in an apparent attempt to avoid a ruling on the merits of Petitioners' Rule 41(e) motion, there has been no significant activity by that grand jury for almost a year. Thus, Petitioners, who believe that they were the victims of an unlawful search and seizure in July of 1987, have been denied any forum in which to address the violation of their constitutional rights even though they have not been formally charged with any crime. The government should not be allowed, by authorizing a grand jury investigation, to dictate unilaterally the appealability of district court orders and deny citizens a forum to address violations of their constitutional rights.

The decisions of the Sixth, Seventh, Eighth and Tenth Circuits providing for the appealability of pre-indictment Rule 41(e) orders also conform with earlier decisions of this Court. In *Perlman v. United States*, 247 U.S. 7, 38 S. Ct. 417, 62 L. Ed. 950 (1918), Perlman filed a motion seeking the return of documents impounded in the custody of the clerk of the

district court and an order enjoining the United States Attorney from submitting those documents to a grand jury investigating possible criminal violations by Perlman. Perlman's motion was denied and he appealed. On appeal, the government argued that because a grand jury had already been convened, the order denying Perlman's motion for the return of the documents was interlocutory and not subject to appeal. This Court rejected the government's argument, and stated:

> The second contention of the government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought .... We are unable to concur.

Perlman, 247 U.S. at 12, 38 S. Ct. at 419.

In *Burdeau v. McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921), this Court reached a similar conclusion. In that case, McDowell sought the return of various documents stolen from his office by business associates and delivered to the office of the Attorney General of the United States. Although a federal grand jury had been convened and was actually investigating possible criminal violations by McDowell, this Court nevertheless entertained the appeal because no information or indictment had yet been returned against the petitioner. *Burdeau*, 256 U.S. at 475, 41 S. Ct. at 576.

Finally, in *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1930), this Court again rejected the government's argument that a district court's order with respect to a Rule 41(e) motion was interlocutory and non-appealable even though no formal charges of criminal violations had been brought. *Go-Bart* held that prior to the return of an information or indictment a criminal pro-

ceeding is not yet sufficiently advanced to make a district court's Rule 41(e) order interlocutory.

> When the application was made, no information or indictment had been found or returned against Gowen or Bartels. There was nothing to show that any criminal proceeding would ever be instituted in that court against them.

Go-Bart, 282 U.S. at 356, 51 S. Ct. at 157.

In the case at bar, there exists at most an investigation of alleged criminal conduct involving certain Petitioners. No arrests or formal charges have been made in the 17 months since the search and seizure in July of 1987. In accordance with this Court's ruling in *Di Bella*, the mere authorization of a federal grand jury cannot serve to shift the government's case from the investigatory to accusatory stage, thereby converting it into a criminal prosecution *in esse*. If that were the law, the government could effectively foreclose any judicial review of a Rule 41(e) order by simply authorizing a grand jury to "investigate" alleged criminal violations.

III. THE FIFTH CIRCUIT COURT OF APPEALS, IN REFUSING TO ADDRESS PETITIONERS' APPEAL, HELD THAT 28 U.S.C. § 1331 DOES NOT PROVIDE A DISTRICT COURT WITH FEDERAL QUESTION JURISDICTION OF A RULE 41(e) MOTION.

Contrary to the finding of the Fifth Circuit Court of Appeals, the district court did deny Petitioners' Rule 41(e) motion on jurisdictional grounds. In their motion, Petitioners asserted two independent jurisdictional bases for their Rule 41(e) motion: (1) federal question jurisdiction pursuant to 28 U.S.C. § 1331; and (2) the district court's anomalous jurisdiction.

In both of the district court's Memorandum Opinion and Orders, dated February 11, 1988 and May 9, 1988, respectively, the district court ruled that although Petitioners asserted that federal question jurisdiction exists pursuant to 28 U.S.C. § 1331, a district court may only act upon a Rule 41(e) motion pursuant to its anomalous jurisdiction.

> In the absence of any authority for the proposition that the 1980 amendment to 28 U.S.C. § 1331 stripped Fed. R. Crim. P. 41(e) of equitable considerations, the court concludes that Rule 41(e) movants must satisfy the irreparable injury and other equitable requirements adopted by the Fifth Circuit.

In Re: Search Warrant Issued July 14, 1987, 684 F. Supp. 1417, 1420, n. 3, Appendix C at C-6, n. 2 (N.D. Tex. 1988).

Further, the district court refused to address the merits of the allegations in Petitioners' Rule 41(e) motion that the Petitioners are entitled to lawful possession of the property and the property was taken in an unlawful search and seizure. The district court simply held that Petitioners had failed to plead a colorable showing of irreparable injury which it found is a necessary prerequisite for it to exercise its anomalous jurisdiction. In addition, the district court ruled that Petitioners would be unable to plead irreparable injury "in the face of the government's willingness to make available to movants copies of all documents seized and to return certain original documents." *In Re: Search Warrant Issued July 14, 1988*, 684 F. Supp. 1417, 1423, Appendix C at C-13 (N.D. Tex. 1988).

Thus, the Fifth Circuit Court of Appeals plainly erred in determining that the district court's action was not based "wholly or even partially on jurisdictional grounds." *In Re: Search Warrant Issued July 14, 1987*, 857 F.2d 790, No. 88-

1355, slip op. at 2, Appendix A at A-2, n. 1 (5th Cir. Sept. 2, 1988). This erroneous finding is critical because by refusing to address Petitioners' appeal the Fifth Circuit: (1) implicitly affirmed the district court's holding that 28 U.S.C. § 1331 does not provide a district court with federal question jurisdiction of a Rule 41(e) motion; and (2) took a position as to appealability of Petitioner's Rule 41(e) motion which is inconsistent with well established law that a court of appeals has jurisdiction on appeal of a district court's ruling dismissing an action on jurisdictional grounds.

1. 28 U.S.C. § 1331 PROVIDES A DISTRICT COURT WITH FEDERAL QUESTION JURISDICTION OF A RULE 41(e) MOTION.

The doctrine of anomalous jurisdiction was "necessitated, at least in part, by the amount-in-controversy requirement for federal question jurisdiction, 28 U.S.C. § 1331." *Linn v. Chivatero*, 714 F.2d 1278, 1281 (5th Cir. 1983). That statement finds full support in the historical development of anomalous jurisdiction and its application in Rule 41(e) proceedings.

Rule 41(e) was not founded on equitable principles. Rather, it was principally a "restatement of existing law and practice." *See*, Notes of Advisory Committee on Rules concerning Rule 41(e), Fed. R. Crim. P. None of the decisions of this Court cited by the drafters of Rule 41(e) are based on equitable considerations, but are concerned only with the existence of a remedy for the violation of a constitutional right, including a violation of an individual's rights under the Fourth and Fifth Amendments. *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914); *Silverthorn Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1919); *Agnello v. United States*, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925).

The equitable principles referenced by the district court in this case, including the necessity of showing irreparable harm, found their way into Rule 41(e) proceedings solely because the courts were unable to find any statutory jurisdictional basis for those actions. In fact, in *Hunsucker v. Phinney*, 497 F.2d 29 (5th Cir. 1974), *cert. denied*, 420 U.S. 927, 95 S. Ct. 1124, 43 L. Ed. 2d 397 (1975), the Fifth Circuit diligently examined the possibility that some statutory jurisdiction existed to support the plaintiff's motion in that case. It was only after that exercise proved futile that the Court of Appeals affirmed the district court's dismissal of the appellants' action, stating:

> Exercise of non-statutory equitable or supervisory jurisdiction is not warranted in this case, and *we find no basis for statutory jurisdiction.*

Hunsucker, 497 F.2d at 36 (emphasis added).

Petitioners assert that not only do they no longer have to meet any judicially created requirements for the exercise of anomalous jurisdiction in the district court proceeding, but that the doctrine has outlived its usefulness and did not survive the repeal of the amount-in-controversy requirement of 28 U.S.C. § 1331. As the Fifth Circuit stated in *Linn*:

> The doctrine of anomalous jurisdiction was necessitated by the jurisdictional amount requirement in 28 U.S.C. § 1331. The exercise of jurisdiction was "anomalous" because the federal courts had created their own jurisdiction without any constitutional or statutory basis in the face of inconsistent, if not antithetical, Congressional expression. With the elimination of the jurisdictional amount requirement, anomalous jurisdiction — once a necessary evil — has become a superfluous anachronism. It is impossible to imagine a case in which anomalous

> jurisdiction would have existed that did not involve a federal question. This case illustrates that anomalous jurisdiction is a dead letter.

Linn, 714 F.2d at 1285 (Clark, J., concurring).

This Court should end the confusion created by the doctrine of anomalous jurisdiction and rule that, at least as to proceedings brought under Rule 41(e), equitable principles are no longer applicable. Indeed, Congress has already addressed that issue by enacting the amendment to 28 U.S.C. § 1331, Public Law 94-574 (the "Bill") that eliminated the $10,000 requirement for federal question litigation. It was the stated purpose of the Bill to remove certain technical barriers to consideration on the merits of citizens' complaints against the federal government, its agencies, or employees. *See*, H.R. 94-1656, 94th Cong., 2d Sess., p. 3, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 6121, 6123.

For courts to exercise anomalous jurisdiction, or to preserve the test created by courts specifically as an aid to determine whether to exercise that jurisdiction, and to impose that court-developed body of law on Congress' amendment to § 1331 would violate the separation of powers doctrine. As stated by this Court:

> The Constitution, in distributing the powers of government, creates three distinct and separate departments. This separation is not merely a matter of convenience or governmental mechanism. Its object is basic and vital . . . namely, to preclude a commingling of these essentially different powers of government in the same hands.

O'Donoghue v. United States, 289 U.S. 516, 530, 53 S. Ct. 740, 743 (1933).

The legislative history of the 1976 amendments make clear that Congress wanted to move away from the confused doctrine of anomalous jurisdiction in order to permit review of federal controversies despite the absence of the previous amount-in-controversy requirement.[7] Thus, the separation of powers long recognized by this Court, coupled with clear legislative intent in the revision of 28 U.S.C. § 1331, require that the equitable considerations developed by the courts to constrain the exercise of anomalous jurisdiction have no place in determining the availability of federal question jurisdiction pursuant to 28 U.S.C. § 1331.

2. THE DISTRICT COURT'S ORDER WAS BASED ON JURISDICTIONAL GROUNDS AND THEREFORE CONSTITUTED A FINAL AND APPEALABLE DECISION.

As the Court of Appeals noted in its opinion, an order with respect to a Rule 41(e) motion is immediately appealable in

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[7] The legislative history of the amendment to 28 U.S.C. § 1331 chides federal courts for "adopting a very lax interpretation" of the predecessor federal question jurisdiction statute. It recognizes that prior to the amendment of 28 U.S.C. § 1331, federal district courts had avoided or circumvented altogether the $10,000 jurisdictional amount in an effort to avoid a perceived injustice if that amount stood as a barrier to a plaintiff obtaining an otherwise available remedy. In the legislative history, Congress states that such avoidance, in the form of skirting 28 U.S.C. § 1331 and using court-created jurisdictional forums, "abdicates a court's constitutional and statutory duties." H.R. 94-1656, 94th Cong., 2d Sess., p. 17, n. 50 & 51, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 6138. Further, Congress expressed an awareness of the criticism of numerous scholars calling on Congress rather than the courts to fill in the "unfortunate gap in the statutory jurisdiction of the federal courts." H.R. 94-1656, 94th Cong., 2d Sess., p. 17, n. 51, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 6138, citing *Wright, Miller, and Cooper*, 13 Federal Practice and Procedure, 3561 at pp. 395, 396.

the Fifth Circuit if the district court denies the motion on jurisdictional grounds and does not render a decision on the merits. *In Re: Search Warrants Issued July 14, 1987*, 857 F.2d 790, No. 88-1355, slip op. at 2, Appendix A at A-2 (5th Cir. Sept. 2, 1988). As the Fifth Circuit had previously stated in *Richey v. Smith*, 515 F.2d 1239 (5th Cir. 1975):

> [W]e note that the Order appealed from rested solely on jurisdictional grounds and was not a ruling on the merits of the motion as was the case in *Di Bella*. In these circumstances, we determine that the district court order was final and is properly before us for appellate review. Accordingly, we proceed to consider the district court ruling on the jurisdictional issue.

Richey, 515 F.2d at 1242-43.

Other circuits have likewise held that whenever a district court's ruling constitutes the dismissal of an action solely on jurisdictional grounds, the court of appeals has jurisdiction of an appeal of that ruling. In *United States v. Price McNemar Construction Co.*, 320 F.2d 663 (9th Cir. 1963), the district court dismissed the plaintiff's action on the ground of lack of subject matter jurisdiction. The plaintiff appealed and the defendant argued that the court of appeals did not have jurisdiction to entertain the appeal. That court, in denying the motion to dismiss, stated:

> If . . . a district court denies relief on the ground that it lacks jurisdiction, a court of appeals has jurisdiction to entertain the appeal for the purpose of determining whether the district court correctly decided the jurisdictional question.

Price McNemar, 320 F.2d at 664. *See also, Reuber v. United States*, 773 F.2d 1367 (D.C. Cir. 1985); *McLaughlin v. Arco*

Polymers, Inc., 721 F.2d 426 (3rd Cir. 1983); *Sherman v. American Federation of Musicians*, 588 F.2d 1313 (10th Cir. 1978).

That Rule 41(e) was intended to provide citizens with a pre-indictment forum for addressing alleged violations of their Fourth Amendment rights is indisputable. However, if the opinion of the Fifth Circuit Court of Appeals remains untested, the government can effectively foreclose the availability of that remedy, prescribed by Congress and adopted by this Court in the context of Rule 41(e). The government can accomplish that result simply by: (1) agreeing at the district court level to return copies of illegally seized documents to the movant, thereby preempting that court's anomalous jurisdiction because no irreparable injury could be shown; and (2) forever precluding a decision on the merits of the Rule 41(e) motion by immediately convening a grand jury investigation. This is precisely what the government has attempted here — thus far with total success.

Petitioners' Rule 41(e) motion for the return of seized property was dismissed by the district court purely on jurisdictional grounds. The district court found that federal question jurisdiction pursuant to 28 U.S.C. § 1331 was inapplicable in a Rule 41(e) context and that Petitioners could not demonstrate irreparable injury for the district court to exercise its anomalous jurisdiction because the government had offered to provide Petitioners with copies of the seized documents. By dismissing Petitioners' appeal, the Fifth Circuit Court of Appeals has effectively foreclosed every citizen's right to adjudicate the merits of an illegal search and seizure. That result, if left standing, would emasculate Rule 41(e) and leave only the government to serve as the judge and the jury with respect to the conduct of its own criminal investigations.

CONCLUSION

For all of these reasons, certiorari should be granted in this case. The decision of the Fifth Circuit Court of Appeals is in direct conflict with the decisions of at least four other courts of appeals, and is inconsistent with this Court's opinions in *Di Bella, Perlman, Burdeau* and *Go-Bart*. If left standing, the decision of the Court of Appeals for the Fifth Circuit will serve to foreclose any effective relief pursuant to Rule 41(e), which is contrary to the intent of both Congress and this Court in adopting Rule 41(e).

Respectfully submitted,

By:

ROBERT EDWIN DAVIS

DAVIS, MEADOWS, OWENS,
COLLIER & ZACHRY
3700 First RepublicBank Plaza
901 Main Street
Dallas, Texas 75202
(214) 744-3700

Counsel for Petitioners

APPENDICES

APPENDIX A

United States Court of Appeals
For the Fifth Circuit
857 F.2d 790
No. 88-1355
(5th Cir. Sept. 2, 1988)

APPENDIX B

United States Court of Appeals
For the Fifth Circuit
No. 88-1355
(5th Cir. Sept. 28, 1988)

APPENDIX C

United States District Court
Northern District of Texas
Dallas Division
684 F. Supp. 1417
(N.D. Tex. 1988)

APPENDIX D

United States Constitution — Amendment IV

APPENDIX E

28 U.S.C. § 1331

APPENDIX F

Rule 41(e) of the Federal Rules of Criminal Procedure

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-1355

IN RE: SEARCH WARRANT ISSUED JULY 14, 1987.

MICHAEL J. BARTON and
BARTON BROTHERS PRODUCE, et al.,

Appellants.

Appeals from the United States District Court for the Northern District of Texas

(FILED SEPTEMBER 2, 1988)

Before REAVLEY, DAVIS and JONES, Circuit Judges.*
PER CURIAM:

Appellants here contest the district court's order which refused to require the government to return documents seized pursuant to an IRS search warrant. We dismiss.

First, the Government's argument that appellants' notices of appeal are untimely filed is meritless. Even if F.R.A.P. 4(b) controls, the 10-day filing period has yet to expire because the trial court has not placed this matter on its criminal docket, but rather on its "miscellaneous docket." *See* F.R.A.P. 4(b) ("In a criminal case the notice of appeal by a defendant

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. . . . A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket.").

The Government, relying on *DiBella v. United States,* 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962), also asserts that the district court's order denying the requested relief is not a final order subject to appellate review. Under *DiBella,* a district court order denying appellants' pre-indictment motions for return of property is subject to appellate review only if (i) the motion is solely for the return of property and (ii) the motion is in no way tied to a criminal prosecution in esse against the movant. *Id.* at 131-32, 82 S.Ct. at 660; *Richey v. Smith,* 515 F.2d 1239, 1242 (5th Cir. 1975).[1] A federal grand jury has been authorized to investigate potential criminal liability of certain appellants. The only appellant who alleges that he is not a grand jury target is Michael J. Barton. He may be subject to criminal liability, however, as he is a partner in Barton Bros. Produce.

The second prong of *DiBella* precludes appellate review of the district court's order. It is therefore ORDERED that the Government's motion to dismiss the appeals for lack of appellate jurisdiction is granted.

MOTION GRANTED; APPEALS DISMISSED.

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[1] Unlike the order in *Richey,* and contrary to appellants' beliefs, the district court's order here does not rest wholly or even partially on jurisdictional grounds. The district court denied appellants' motions because "neither the Rodgers nor the Barton movants have made a colorable showing of irreparable injury." Order dated May 9, 1988, at p. 5.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-1355

IN RE: SEARCH WARRANT ISSUED JULY 14, 1987.

MICHAEL J. BARTON and
BARTON BROTHERS PRODUCE, et al.,
Appellants.

Appeals from the United States District Court for the Northern District of Texas

ON PETITIONS FOR REHEARING

(FILED SEPTEMBER 28, 1988)

Before REAVLEY, DAVIS and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/s/ EDITH H. JONES
United States Circuit Judge

APPENDIX C

In re SEARCH WARRANT ISSUED JULY 14, 1987

Misc. No. 2433-D

UNITED STATES DISTRICT COURT
N.D. TEXAS,
DALLAS DIVISION.

Feb. 11, 1988

On Amended Motion for Return
May 9, 1988.

MEMORANDUM OPINION AND ORDER

FITZWATER, District Judge.

A large scale search and seizure operation conducted by agents of the Internal Revenue Service has resulted in various Fed.R.Crim.P. 41(e) motions for return of property and a motion by the government to stay the proceedings indefinitely pending the outcome of a grand jury investigation. Because the court concludes that the Rule 41(e) movants have yet to make a colorable showing of irreparable injury, the court does not reach the government's motion to stay, and instead affords the movants the opportunity to amend their pleadings to conform to the applicable equitable standards.

I.

BACKGROUND FACTS AND PROCEDURAL HISTORY

On July 21, 1987, acting pursuant to a warrant issued by a magistrate of this court, agents of the Internal Revenue Service ("IRS") conducted a large scale search of the premises of W.W. Rodgers & Sons Produce, Inc. and Barton

Brothers Produce and seized a large volume of documents. IRS agents also searched the persons of Roy Douglas Rodgers and Frank Barton. The searches were conducted to obtain evidence of alleged criminal violations of the internal revenue laws, including tax evasion, fraud, and the making of false statements, resulting from currency skimming, money laundering, and illegal kickbacks.

Following the search and seizure in question, Roy Douglas Rodgers, W.W. Rodgers & Sons Properties, Inc., W.W. Rodgers & Sons Fruits and Vegetables, Inc., Apple Trucking, Inc., Lettuce Invest, Inc., and W.W. Rodgers & Sons Produce, Inc. ("Rodgers"), filed Rule 41(e) motions for the return of the seized property or, in the alternative, for the return of copies of the seized property. Thereafter, Franklin W. Barton ("Barton") filed a similar motion, and Roger Sutton, a Rodgers' employee who was present during the search and was questioned and detained by IRS agents, adopted the Rodgers' motion.

On October 2, 1987, the court convened a hearing in order to "receive evidence on any issue of fact necessary to the decision of the motion." *See* Fed.R.Crim.P. 41(e). After hearing the testimony of three witnesses and extensive arguments of counsel concerning admissible testimony, and after considering the terms of an agreement among the government and the movants that would permit the inventorying of seized documents (Tr. 185-193), the court adjourned the proceeding, indicating that it would consider certain substantive matters and make appropriate rulings before reconvening the hearing. *Id.* at 192, 198.

Before the hearing was reconvened, however, the government filed a November 17, 1987 motion for indefinite stay order. The government contends that a grand jury is now investigating the matters that are the subject of the search

and seizure and that the instant proceedings should be stayed pending completion of the grand jury investigation.

II.

DISCUSSION

As noted, the court has previously indicated its intention to rule on substantive questions raised at the October 2 hearing in order that the issues presented can be decided expeditiously. The government's subsequently filed motion for indefinite stay order has not affected the court's intentions, because the court concludes that movants have yet to plead a colorable claim of irreparable injury that would warrant the court's reconvening an evidentiary hearing. It is thus unnecessary, at this juncture, to decide the government's motion.

A.

This court's authority to grant Rule 41(e)[1] relief derives from its power over court officers. *Hunsucker v. Phinney*, 497 F.2d 29, 32-34 (5th Cir. 1974), *cert. denied*, 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975) (declaratory judgment action to prohibit use of seized documentary evidence and

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[1] Fed.R.Crim.P. 41(e):
A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Rule 41(e) proceeding to obtain return of property). Such jurisdiction should be exercised, however, with caution and restraint and subject to equitable principles. *Id.* at 34. Indeed, Rule 41 "is a crystallization of a principle of equity jurisdiction." *Id.* (quoting *Smith v. Katzenbach*, 351 F.2d 810, 814 (D.C. Cir. 1965)). *See also Richey v. Smith*, 515 F.2d 1239, 1243 (5th Cir. 1975); *Watts v. Kroczynski*, 636 F.Supp. 792, 796 (W.D. La. 1986). Courts in other circuits have also held that proceedings for the return of seized property are governed by equitable principles. *See Pieper v. United States*, 604 F.2d 1131, 1133 (8th Cir. 1979) (action to quash search warrant and suppress evidence) ("[T]he District Court's equitable jurisdiction to suppress illegally obtained evidence before an indictment has been issued has been firmly established. However, the jurisdiction is an extraordinary one and is to be exercised with caution and restraint."); *Mr. Lucky Messenger Service, Inc. v. United States*, 587 F.2d 15, 17 (7th Cir. 1978) (civil action seeking return of seized currency); *Klitzman, Klitzman & Gallagher v. Krut*, 591 F.Supp. 258, 266 (D.N.J.), *aff'd*, 744 F.2d 955 (3d Cir. 1984) (civil action seeking, in part, injunctive relief requiring return of seized documents); *Hiller v. Murphy*, 600 F.Supp. 14, 16 (N.D. Ga. 1984) (suit for injunctive relief seeking return of property seized, suppression of evidence, and cessation of further investigations based on seized materials).

[1] One such principle of equity is that relief should not be granted in the absence of a showing of irreparable injury. *See, e.g., G.M. Leasing Corp. v. United States*, 429 U.S. 338, 359-60, 97 S.Ct. 619, 632, 50 L.Ed.2d 530 (1977) (holding petitioner had not demonstrated "the irreparable injury required to support a motion to suppress, under Fed.Rule Crim.P. 41(e), on equitable grounds in advance of any proceedings. . . .") (citing *Hunsucker*, 497 F.2d at 34). In *Richey*, the Fifth Circuit set forth various factors for a district court to

consider when determining whether to exercise its jurisdiction, two of which are whether the plaintiff would be irreparably injured by denial of the return of the property and whether plaintiff has an adequate remedy at law for the redress of his grievance. 515 F.2d at 1243-44. *See also Marshall v. Central Mine Equipment Co.*, 608 F.2d 719, 721 (8th Cir. 1979) (OSHA search warrant case) (plaintiff must clearly demonstrate that his constitutional rights cannot be adequately adjudicated in the pending or anticipated enforcement proceeding against him) (citing *Hunsucker*, 497 F.2d at 34-35).

[2] Thus far, however, movants have not adequately demonstrated even a colorable claim of irreparable injury.[2]

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[2] Movants have yet to contend that equitable principles do not apply to this proceeding but the October 1, 1987 reply brief of Rodgers et al. inferentially presents the argument. (*See Rodgers et al.* October 1, 1987 Rep.Br. at 2-3). In their reply brief, movants rely on *Linn v. Chivatero*, 714 F.2d 1278 (5th Cir. 1983), for the proposition that movants need not invoke this court's anomalous jurisdiction. *Linn* holds that, in civil actions where a party seeks recovery of property for alleged violations of the Fourth Amendment, federal question jurisdiction now exists pursuant to 28 U.S.C. § 1331 in view of Congress' removal of the amount-in-controversy requirement. 714 F.2d at 1281. Another judge of this court, in fact, has read *Linn* to eliminate any "heightened threshold to the entertaining of [a] case." *Hearn v. Internal Revenue Agents*, 597 F.Supp. 966, 968 (N.D. Tex. 1984) (Sanders, J.) (civil action seeking order for return of documents and injunction against IRS preventing any use of information gathered in search).

Linn and *Hearn*, however, were civil actions which sought injunctions compelling the return of property and foreclosing the use of information taken from the documents. Neither case expressly dealt with Rule 41(e) and, while Judge Sanders rejected in *Hearn* the government's reliance on the "callous disregard" standard of *Richey v. Smith*, 515 F.2d 1239, 1243 (5th Cir. 1975), a Rule 41(e) case, as being necessary to invoke the court's anomalous

They have focused primarily on another ineluctable element of a Rule 41(e) motion, the legality of the search and seizure, but this has been to the virtual exclusion of necessary equitable considerations that govern Rule 41(e).[3] In its August 18,

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jurisdiction, 597 F.Supp. at 968, he did not address whether the Fifth Circuit's *Linn* decision would affect a Rule 41(e) motion. Indeed, in Barton's September 30, 1987 response, he concedes in another context that Rule 41(e) was not "implicated" in *Hearn*. (*See* Barton Resp. at 5.)

This court has found no authorities which would undermine the propositions that a district court acts upon a Rule 41(e) motion pursuant to its anomalous jurisdiction and that principles of equity apply. In *In re Grand Jury Proceedings*, 724 F.2d 1157, 1160 (5th Cir. 1984) (dictum), decided after *Linn*, the Fifth Circuit, without mentioning *Linn*, quoted with approval the *Richey* holding that actions for return of property made prior to the initiation of any civil or criminal proceedings flowing from the seizure of that property " 'are governed by equitable principles, whether viewed as based on F.R.Crim.P. 41(e) or on the general equitable jurisdiction of the federal courts.' " (citing *Richey*, 515 F.2d at 1243). Moreover, in *Watts v. Kroczysnki* (sic), 636 F.Supp. 792 (W.D. La. 1986), a civil action that sought an injunction requiring the return of documents and requested Rule 41(e) relief, the district court, citing *Linn* as well as *Richey*, held that it possessed jurisdiction pursuant to 28 U.S.C. § 1331 and the doctrine of anomalous jurisdiction, *id.* at 795, and applied principles of equity in deciding the Rule 41(e) issues. *Id.* at 796 (citing *Smith v. Katzenbach*, 351 F.2d 810, 814 (D.C. Cir. 1965), and *Hunsucker v. Phinney*, 497 F.2d 29, 34 (5th Cir. 1974), *cert. denied*, 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975)).

In the absence of any authority for the proposition that the 1980 amendment to 28 U.S.C. § 1331 stripped Fed.R.Crim.P. 41(e) of equitable considerations, the court concludes that Rule 41(e) movants must satisfy the irreparable injury and other equitable requirements adopted by the Fifth Circuit.

[3] Barton does contend in his December 3, 1987 memorandum (*see* Mem. at 6-7) and his January 27, 1988 reply (*see* Rep. at 1-2) that

1987 brief, Rodgers devoted just over one page to the need for return of its records (relying on recordkeeping requirements of the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499a et seq.), and the balance of the brief to the illegality of the search. Movant, Barton, adopted the motions of Rodgers et al. and set forth no express reasons for requiring the return of his property. At the portion of the hearing completed on October 2, the thrust of movants' initial presentation was upon the legality of the search. Thus far, the pleading of irreparable injury has been insufficient to warrant continuing the hearing.[4]

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irreparable harm need not be shown where an alleged deprivation of a constitutional right is involved. Barton relies upon a learned treatise in support of this contention. If this proposition is correct in the Rule 41(e) context, however, several courts, including the Fifth Circuit, have erected unnecessary equitable requirements that could have been dispensed with on the ground that, because Rule 41(e) necessarily involves a claimed constitutional deprivation, irreparable injury may be presumed upon proof of a constitutional violation. That the courts have not done so, *cf., e.g., Richey,* 515 F.2d at 1243-44, is evidence that they reject Barton's argument.

Aside from Barton's constitutional argument, however, he has stated in only the most general terms that he is harmed by the government's retaining his documents.

[4] Movants' emphasis on the lawfulness of the search and seizure, as opposed to the equitable considerations that the court is to consider, raises the question whether movants have focused too narrowly on the aspect of the Rule that renders inadmissible at trial property that was seized unlawfully. While Rule 41(e) does so provide, the Rule was not intended to supplant Rule 12 as the principal vehicle for the suppression of evidence. *See Application of Sentinel Government Securities,* 530 F.Supp. 793, 797 (S.D.N.Y. 1982) (absent unique property or privileged documents, consideration of Fourth Amendment must be deferred to Rule 12 motion to suppress).

B.

Whether movants can plead irreparable injury with requisite specificity may hinge on whether the government makes available to movants copies of needed documents retained by the grand jury or returns documents that are not needed by the grand jury or by government prosecutors. Other courts have held that Rule 41(e) movants do not suffer irreparable harm where the government represents it will voluntarily return property, *see Ex parte Decious*, 622 F.Supp. 40, 40-41 (E.D.N.Y.), *app. dism'd*, 779 F.2d 35 (2d Cir. 1985) (table), *cert. denied sub nom. Law Firm of Daniel P. Foster v. United States*, 474 U.S. 1061, 106 S.Ct. 808, 88 L.Ed.2d 783 (1986); *Standard Drywall, Inc. v. United States*, 668 F.2d 156, 157 n. 2 (2d Cir.), *cert. denied*, 456 U.S. 927, 102 S.Ct. 1973, 72 L.Ed. 2d 442 (1982) (dictum) (questioning whether, in absence of seizure of unique property or privileged documents, party can demonstrate irreparable harm when government provides copies of seized documents or returns originals), and that, generally, where a party is the target of an ongoing grand jury investigation, Fourth Amendment considerations should be deferred, "provided that the Government cooperates by giving copies of items seized or by returning the originals." *Zadok v. Sergeant*, Civil Action No. H-86-1719 (S.D. Tex. Feb. 27, 1987) (unpublished order) slip op. at 3, *app. dism'd*, No. 87-2378 (5th Cir. Jul. 22, 1987) (unpublished opinion) (per curiam) (citing *Application of Sentinel Government Securities*, 530 F.Supp. 793, 797 (S.D.N.Y. 1982)).

In the present case the government and movants, pursuant to a court order that culminated from a discussion at the October 2 hearing (Tr. 185-193), apparently have inventoried the seized documents. It is not unreasonable for the court to anticipate that movants and the government can next agree upon which documents (or copies) can be returned to movants. If the government agrees to return originals and/or

copies of documents, it is difficult to envision that movants can comply with the irreparable injury standard.

III.

[3] For the foregoing reasons, the court will require movants to plead a colorable claim of irreparable injury before considering further their Rule 41(e) motions. If they amend their pleadings within 20 days of the date this memorandum opinion and order is filed, the government shall thereafter have 10 days to file a response. The court shall determine whether the pleadings, if supported by proof, would be sufficient to show irreparable injury. If movants file no amended pleadings or choose affirmatively to stand on their present pleadings, the court will consider the motion to be denied without prejudice to a movant's later filing a Rule 12 motion.

The court abates determining the government's motion for indefinite stay order. Movants may amend their Rule 41(e) motions in accordance with this memorandum opinion and order.

SO ORDERED.

ON AMENDED MOTIONS
FOR RETURN

In response to the court's February 11, 1988 memorandum opinion and order, movants have filed amended motions for return of seized property in which they attempt to satisfy the irreparable injury requirement that the court concluded is imposed on a Fed.R.Crim.P. 41(e) movant. Movants also urge the court to hold that they need not demonstrate irreparable injury in order to obtain Rule 41(e) relief. The court declines

to vacate its prior ruling and concludes that movants have failed to plead a colorable claim of irreparable injury.

I.

The court turns first to movants' requests for reconsideration, in which they present thoughtful arguments to support the proposition that a Rule 41(e) movant need not demonstrate irreparable injury. Movants have carefully analyzed the development of Rule 41(e) jurisprudence and have set forth an arguable basis for a court less fettered to hold that equitable prerequisites should not be imposed. It nevertheless remains that this court is bound to follow the law of this circuit which, so far as this court can discern, adheres to imposition of equitable requirements. *See supra* at 1420 n. 2. While there are recent cases that decline to require a Rule 41(e) movant to demonstrate irreparable injury, *see, e.g., Floyd v. United States*, 677 F.Supp. 1083, 1087 n. 2 (D. Colo. 1987) (plain language of Rule 41(e) makes no reference to irreparable harm) (citing cases), other courts, including the Eighth Circuit, have required such a showing. *See In re Harper*, 835 F.2d 1273, 1274 (8th Cir. 1988) (Rule 41(e) case) (district court equity jurisdiction to be exercised in accordance with familiar limitations on the granting of equitable relief) (quoting *Meier v. Keller*, 521 F.2d 548, 554 (9th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1410, 47 L.Ed.2d 348 (1976)); *id.* at 1275 ("the district court's refusal to exercise its equitable jurisdiction was also proper because [movant] has an adequate remedy at law and will not suffer irreparable harm. . . ."). The court will adhere to its prior holding that a colorable showing of irreparable injury must be pleaded before the court will consider further the pending motions.

II.

The court next determines whether movants[1] have pleaded a colorable claim of irreparable injury.

In the February 11, 1988 memorandum opinion and order, the court observed that "[w]hether movants can plead irreparable injury with requisite specificity may hinge on whether the government makes available to movants copies of needed documents retained by the grand jury or by government prosecutors." *See supra* at 1421. The government advised the court, in an April 11, 1988 response, that the government had returned to movants "the originals on microfilm copies of approximately half of the records seized from Rodgers" and "is presently microfilming the remaining records and expects to have completed the copying in about two weeks."[2] In a May 2, 1988 letter, the government advised the court that it had "completed microfilming the records seized from the premises of [Rodgers] . . . and ha[d] provided to counsel for

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[1] In addition to the original movants, J. Michael Barton ("Michael") and Barton Brothers Produce ("BBP"), a partnership, have joined in the amended motion of Franklin W. Barton ("Barton"). The government contends these additional parties cannot now be added as movants and have not demonstrated they have standing to raise Fourth Amendment claims. The court grants Michael and BBP leave to join Barton's amended motion. Because the court denies the motion on other grounds, the court does not reach the question whether Michael and BBP can satisfy the standing requirement.

[2] The government's representations regarding the return of documents are directed to the Rodgers movants rather than the Barton movants. The Barton movants have informed the government that they require records to prepare income tax returns but have declined, on Fifth Amendment self-incrimination grounds, to designate which records they need.

the Rodgers microfilm copies of these records and, with respect to some records, the originals."[3]

The court has already implicitly rejected certain of the grounds on which movants rely to plead a colorable claim of irreparable injury. By concluding, as do other courts, that Fourth Amendment considerations should normally be deferred, the court has already held to be inadequate movants' irreparable injury claims predicated on the threat of unjustified prosecution, the denial of right to counsel during illegal search, the necessity to undergo the needless expense and embarrassment of extended investigation, the possibility of repeated spurious litigation and wrongful indictment, and the violation of constitutional rights. The Rodgers movants also contend they do not have an adequate remedy at law by way of motion to suppress because "tax investigations are among the slowest developing of all criminal prosecutions" and it may take 18 months to three years before the case reaches the indictment stage, if ever. They posit that, if their Rule 41(e) motion is denied, they will have no recourse during the intervening period.[4] The Barton movants also assert that they "have need for the seized records on a daily and continuing

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[3] The government also states that it has retained and has not copied a sealed box containing "records of transactions between Rodgers and various attorneys." The government suggests that the court refer these documents to the magistrate for *in camera* determination whether the records contain privileged communications.

[4] The Rodgers movants also argue that three potentially vital witnesses on a motion to suppress are ages 78, 79, and 80 and may later be unavailable. This assertion, without more, is insufficient to plead irreparable injury. While movants assert that their "accounting activities will be critical" to such a motion and that these three company employees "are primarily responsible for the accounting activities," movants do not explain why other witnesses could not provide such testimony equally well.

basis" for business purposes and to prepare tax returns, and that they are irreparably injured because "they have no reasonable means by which they may demand [the IRS or its agents] to compensate them for the deprivation referred to . . . ."

The court concludes that neither the Rodgers nor the Barton movants have made a colorable showing of irreparable injury. To the extent movants' allegations do not present Fourth Amendment-related contentions that are properly deferred, movants are unable to plead irreparable injury in the face of the government's willingness to make available to movants copies of all documents seized and to return certain original documents.

III.

The Rule 41(e) motions are denied without prejudice to the filing of Rule 12 motions, if necessary.

SO ORDERED.

APPENDIX D

United States Constitution — Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX E

28 U.S.C. § 1331.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX F

Rule 41(e) of the Federal Rules of Criminal Procedure.

Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for the return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(2)

No. 88-1153

Supreme Court, U.S.
FILED
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

W.W. RODGERS AND SONS PRODUCE, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
JAMES I.K. KNAPP
Acting Assistant Attorney General
ROBERT E. LINDSAY
GAIL BRODFUEHRER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals had jurisdiction over petitioners' appeal from an order denying their action for the return of seized property under Federal Rule of Criminal Procedure 41(e).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A1-A2) is reported at 857 F.2d 790 (Table). The opinion of the district court (Pet. App. C1-C13) is reported at 684 F. Supp. 1417.

JURISDICTION

The order of the court of appeals dismissing petitioners' appeal was entered on September 2, 1988. A petition for rehearing was denied on September 28, 1988 (Pet. App. B1). The petition for a writ of certiorari was filed on December 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Petitioners filed this action under Federal Rule of Criminal Procedure 41(e), which the Clerk of the District Court placed on that

STATEMENT

1. On July 14, 1987, based on the affidavit of Special Agent Charles Holmes of the Internal Revenue Service (IRS), a United States Magistrate issued a search warrant for the premises of petitioner W.W. Rodgers and Sons Produce, Inc., a wholesale produce distributor located at 1015 South Harwood in Dallas, Texas. That affidavit detailed evidence of violations of federal criminal law, including conspiracy, 18 U.S.C. 371, income tax evasion, 26 U.S.C. 7201, and subscription to fraudulent income tax returns, 26 U.S.C. 7206(1). The violations allegedly arose out of a scheme involving kickbacks, money laundering, and skimming of cash proceeds. Pet. App. C1-C2; Gov't Amended Mem. in Supp. of Opp. to Mot. for Return of Property 1-2, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.).[2] On July 21, 1987, a team of IRS special agents executed the search warrant on petitioners' premises.[3] The agents seized a large volume of

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court's "miscellaneous docket" (Pet. App. A1). If treated as a criminal case, the petition for a writ of certiorari would be untimely under Rule 20.1 of the Rules of this Court. If treated as a civil case, the petition would be timely under Rule 20.2 of the Rules of this Court. See generally R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 302 & n.3 (6th ed. 1986). Because a motion for the return of seized property under Rule 41(e) is not technically a part of a criminal "case," the 60-day time limitation of Rule 20.1 appears to be inapplicable. In any event, petitioners' failure to comply with that filing deadline would not bar this Court's jurisdiction.

[2] Based on Special Agent Holmes' affidavit, the magistrate also issued search warrants for the premises of Barton Brothers Produce, another wholesale produce distributor located in Dallas, and for the persons of petitioner Roy Douglas Rodgers and Frank Barton. Pet. App. C1-C2. Roy Douglas Rodgers owns W.W. Rodgers and Sons Produce, Inc. and its affiliates. July 14, 1987, Tr. 26-27.

[3] On that day, IRS agents also executed the search warrants for Roy Douglas Rodgers, who was found at the Harwood address, and for

documents and also copied other records on microfilm. Pet. App. C1-C2; Gov't Amended Mem. in Supp. of Opp., *supra,* at 3.

2. a. On August 18, 1987, petitioners filed this action for the return of seized property under Federal Rule of Criminal Procedure 41(e) in the United States District Court for the Northern District of Texas.[4] Petitioners contended that the IRS agents' search and seizure of documents violated the Fourth Amendment because, among other reasons, the "purpose and execution of the search warrant [were] improper," the "search warrant was issued without sufficient evidence of probable cause," and the "search and seizure exceeded the scope of the search warrant" (Pet. C.A. Br. 3-4). Petitioners' principal prayer for relief sought an order requiring "the Government to

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Barton Brothers Produce and Frank Barton. Pet. App. C2.

W.W. Rodgers and Sons Produce, Inc., is the parent corporation of petitioners W.W. Rodgers and Sons Properties, Inc.; W.W. Rodgers and Sons Fruits and Vegetables, Inc.; Apple Trucking, Inc.; and Lettuce Invest, Inc., all of which share offices at the South Harwood address. See July 14, 1987, Tr. 26-27; Gov't Amended Mem. in Supp. of Opp. to Mot. for Return of Property 1-2, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.) We will collectively refer to Roy Douglas Rodgers and his firms as petitioners.

[4] Federal Rule of Criminal Procedure 41(e) provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

immediately return to [petitioners] the originals and all copies of all documents and records seized" (Pet. Mot. for the Return of Seized Property 20, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.)).[5]

b. On October 2, 1987, the district court held an evidentiary hearing. After several witnesses testified, the parties reached an agreement concerning the inventorying of certain seized records. In light of the need to consider additional substantive and procedural matters, the district court adjourned the hearing to a later date. Before the court reconvened the hearing, however, a grand jury sitting in the Northern District of Texas began investigating

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[5] Petitioners' Rule 41(e) motion also sought an order requiring the government to provide photocopies "of all documents of which the Court does not order the originals returned," an order requiring the government "to provide in writing an explanation of why it is necessary to retain the original of any record seized pursuant to the Warrant," an order requiring the government "to furnish a specific inventory which describes on a document by document basis the records seized pursuant to the Warrant," an order "[g]ranting [petitioners] immediate access to the seized records," and an order "[a]warding [petitioners] costs, including reasonable attorneys' fees, incurred in seeking the return of the seized records" (Pet. Mot. for the Return of Seized Property 20-21, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.)).

Franklin Barton filed a similar Rule 41(e) motion, in which he adopted the pleadings filed by petitioners. Michael J. Barton and Barton Brothers Produce later joined Franklin Barton's motion. Franklin Barton, Michael J. Barton, and Barton Brothers Produce appealed from the district court's order. They have not, however, sought further review of the court of appeals' order. See Pet. App. C2; R.E. 1-5 ("R.E." refers to the Record Excerpts filed with petitioners' brief in the court of appeals).

Roger Sutton, one of petitioners' employees who was detained by IRS agents during the July 21 search, joined petitioners' Rule 41(e) motion (Pet. App. C2). Sutton also has not sought further review of the court of appeals' order.

the matters that are the subject of the search and seizure petitioners were contesting. On November 17, 1987, the government accordingly requested the district court to stay indefinitely its resolution of petitioners' Rule 41(e) action pending completion of the grand jury's investigation. Pet. App. C2-C3.

Petitioners opposed the government's motion for an indefinite stay, contending that the district court's "power to act * * * cannot properly be terminated by the unilateral decision of the Government to authorize a grand jury investigation" (Pet. Mem. in Opp. to Gov't Mot. for Indefinite Stay 2, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.)). Petitioners asserted that any stay would cause irreparable harm since they "will be compelled to endure the embarrassment and great extent of an extended investigation" (*id.* at 6). Finally, in urging the court not to defer ruling on their Rule 41(e) motion, petitioners emphasized the burden on them and stated that "the Government's investigative efforts may be unnecessary if [the court] ultimately rules in [petitioners'] favor" (*ibid.*).

c. On February 11, 1988, the district court issued an order holding that petitioners "have not adequately demonstrated even a colorable claim of irreparable injury" from a denial of the return of their property (Pet. App. C5 (footnote omitted)). Instead, petitioners had focused "primarily on another ineluctable element of a Rule 41(e) motion, the legality of the search and seizure" (Pet. App. C6).[6] The court recognized, however, that petitioners'

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[6] As the court observed, petitioners' "emphasis on the lawfulness of the search and seizure, as opposed to the equitable considerations that the court is to consider, raises the question whether [petitioners] have focused too narrowly on the aspect of the Rule that renders inadmissible at trial property that was seized unlawfully. While Rule 41(e) does

ability to plead "irreparable injury with certain specificity may hinge on whether the government makes available * * * copies of needed documents retained by the grand jury or returns documents that are not needed by the grand jury or by government prosecutors" (*id.* at C8). Accordingly, the court gave petitioners an opportunity to amend their pleadings in order to demonstrate the requisite irreparable harm (*id.* at C9).[7]

3. Petitioners filed an amended motion, and the district court denied it. The court explained that the denial was without prejudice to petitioners' right to file a motion to suppress evidence under Fed. R. Crim. P. 12(b)(3), if petitioners should be indicted (Pet. App. C9-C13). It found that the government, in response to the court's earlier ruling, had provided petitioners with either microfilm copies or the originals of the seized records (*id.* at C11).[8] Petitioners nevertheless claimed irreparable injury from the fact that they might need to wait several years (assuming the grand jury returned an indictment) before the courts would finally resolve their constitutional challenge to the search and seizure. The district court recognized that "Fourth Amendment considerations

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so provide, the Rule was not intended to supplant Rule 12 as the principal vehicle for the suppression of evidence" (Pet. App. C7).

[7] In light of its disposition, the district court did not rule on the government's motion for an indefinite stay (Pet. App. C3).

[8] The government retained one box of records, which contained documented transactions between petitioners and various attorneys. That box remains under seal. The government asked the court to refer the matter to a magistrate for an in camera determination whether those records contain privileged communications. Pet. App. C12 n. 3.

should normally be deferred" and that petitioners have not made "a colorable showing of irreparable harm" (*id.* at C12, C13). As the court concluded, "[t]o the extent [petitioners'] allegations do not present Fourth Amendment-related contentions that are properly deferred, [petitioners] are unable to plead irreparable injury in the face of the government's willingness to make available * * * copies of all documents seized and to return certain original documents" (*id.* at C13).

4. The court of appeals dismissed petitioners' appeal (Pet. App. A1-A2). Relying on *DiBella* v. *United States,* 369 U.S. 121 (1962), it held that the district court's order denying the Rule 41(e) motion was not a final appealable order. *DiBella* holds that the denial of a preindictment motion under Rule 41(e) is appealable "[o]nly if the motion is solely for the return of property and is in no way tied to a criminal prosecution *in esse* against the movant" (369 U.S. at 131-132). Since petitioners were the subjects of an ongoing grand jury investigation, *DiBella* precluded appellate review of the district court's order. Pet. App. A2.

ARGUMENT

1. Petitioners contend (Pet. 11-19) that the decision below conflicts with *DiBella* v. *United States, supra,* and with those courts of appeals decisions holding that the pendency of a grand jury investigation does not preclude appellate review of the denial of a Rule 41(e) motion. Contrary to petitioners' suggestion, however, the decision of the court of appeals in this case is consistent with *DiBella.* And to the extent the courts of appeals have divided over the second part of the two-part *DiBella* test, this case is not the proper vehicle for resolving that conflict, since peti-

tioners have failed to satisfy the first part of that test, *i.e.*, the requirement that the Rule 41(e) action must be solely for the return of property.

In *DiBella* v. *United States,* this Court held that an order denying a motion for the suppression and return of seized property is not appealable where an indictment intervenes between the filing of that motion and its disposition (369 U.S. at 131-132). The Court concluded that dismissal of such an action is immediately appealable "[o]nly if the [action] is solely for the return of property and is in no way tied to a criminal prosecution *in esse* * * *" (*ibid.*).[9] In applying that two-part test, however, the courts of appeals have divided over whether an ongoing grand jury investigation sufficiently ties a Rule 41(e) action to a criminal prosecution in order to preclude immediate appellate review. The majority view, following the principles of *DiBella*, holds that a grand jury investigation makes appellate review unavailable because "allowance of an appeal in such circumstances would interfere with the grand jury proceedings and allow piecemeal appeals." *Church of St. Matthew* v. *United*

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[9] The Court reasoned:

> Presentations before * * * a grand jury * * * are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train. When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment—in each such case the order on a suppression motion must be treated as "but one step in the criminal case preliminary to the trial thereof."

369 U.S. 131 (quoting *Cogen* v. *United States*, 278 U.S. 221, 227 (1929)).

States, 845 F.2d 418, 419 (2d Cir. 1985) (per curiam).[10] On the other hand, several courts of appeals have held that the existence of a grand jury investigation, without the return of an indictment, does not prevent immediate appellate review under *DiBella*. *E.g., In re 949 Erie Street, Racine, Wis.*, 824 F.2d 538, 540-541 (7th Cir. 1987) ("motion for return of property is not tied to a criminal prosecution until the criminal process shifts from investigatory to accusatory; that is, until charges have been filed").[11]

Contrary to petitioners' contention (Pet. 14), this case does not offer the Court an opportunity to resolve the lower courts' disagreement over the second part of the *DiBella* test. All courts agree that the dismissal of a Rule 41(e) action is appealable only if both parts of the test are satisfied, and petitioners do not challenge that accepted view.[12] In this case, however, petitioners' action fails to

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[10] Accord *In re Grand Jury Proceedings*, 831 F.2d 222, 224 (11th Cir. 1987) (per curiam); *United States* v. *Regional Consulting Services*, 776 F.2d 870, 874 (4th Cir. 1985); *United States* v. *Furina*, 707 F.2d 82, 84 (3d Cir. 1983); *Imperial Distributors, Inc.* v. *United States*, 617 F.2d 892, 896 (1st Cir.), cert. denied, 449 U.S. 891 (1980); *Church of Scientology* v. *United States*, 591 F.2d 533, 535-536 (9th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Glassman*, 533 F.2d 262, 263 (5th Cir. 1976).

[11] Accord *First Nat'l Bank of Tulsa* v. *United States Department of Justice*, No. 88-1623 (10th Cir. Jan. 4, 1989), slip op. 10; *In re Search Warrants (Executed on Jan. 23, 1983)*, 750 F.2d 664, 667-668 (8th Cir. 1984); *Sovereign News Co.* v. *United States*, 690 F.2d 569, 571 (6th Cir. 1982), cert. denied, 464 U.S. 814 (1983).

[12] See, *e.g.*, *Church of St. Matthew* v. *United States*, 845 F.2d at 419; *In re 949 Erie Street, Racine, Wis.*, 824 F.2d at 540-541; *United States* v. *Regional Consulting Services*, 766 F.2d at 873-874; *In re Search Warrants (Executed on Jan. 23, 1983)*, 750 F.2d at 666-668; *In re Grand Jury Proceedings*, 716 F.2d 493, 495 (8th Cir. 1983); *United States* v. *Furina*, 707 F.2d at 84; *Imperial Distributors, Inc.* v. *United States*, 617 F.2d at 895-896.

satisfy the first part of the *DiBella* test, because their Rule 41(e) motion was not filed "solely for the return of property" (369 U.S. at 131-132).

Here, the government provided petitioners with either microfilm copies or the originals of the seized records (Pet. App. C11). Under these circumstances, it is clear that petitioners' continued effort to obtain the remaining originals and the government's retained copies of returned records is nothing more than a motion to suppress the contents of those records. See *Warden* v. *Hayden,* 387 U.S. 294, 305 (1967); *In re 949 Erie Street, Racine, Wis.*, 824 F.2d at 541 (dismissing appeal); *United States* v. *Regional Consulting Services,* 766 F2d 870, 873-874 (4th Cir. 1985) (dismissing appeal); *Imperial Distributors, Inc.* v. *United States,* 617 F.2d 892, 895-896 (1st Cir.) (dismissing appeal), cert. denied, 449 U.S. 891 (1980); compare *In re Grand Jury Proceedings,* 716 F.2d 493 (8th Cir. 1983) (denial of Rule 41(e) motion appealable because motion primarily sought return of original documents that were vital to movant's operation of business). Accordingly, petitioners' Rule 41(e) motion was primarily, if not solely, designed to prevent the government from using the evidence in any current or future criminal proceedings.

Petitioners effectively conceded that point by acknowledging that "the Government's investigative efforts may be unnecessary if [the district court] ultimately rules in [their] favor [on the Rule 41(e) motion]" (Pet. Mem. in Opp. to Gov't Mot. for Indefinite Stay 6, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.)). That point was also clear from petitioners' response to the district court's invitation for petitioners to state the irreparable injury that they expected to suffer from the denial of Rule 41(e) relief. They claimed the injury that they would suffer was that they "will be compelled

to endure the embarrassment and great extent of an extended investigation" (Pet. Mem. in Opp. to Gov't Mot. for Indefinite Stay 6, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.)). By basing their claim of injury on the prospect of a lengthy criminal investigation, petitioners essentially conceded that suppression of the evidence was the primary, if not the sole, purpose underlying their continued litigation of the Rule 41(e) motion.

To be sure, petitioners' original Rule 41(e) motion stated that petitioners "do[] *not* seek, at this time, a ruling that the property which is ordered returned to [their] possession is not admissible evidence" (Pet. Mot. for the Return of Seized Property 1, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.) (emphasis in original)). But petitioners' continued demand for court-ordered relief, even after the government provided petitioners with the originals or copies of the seized records, see Pet. App. C11, demonstrated that petitioners' true reason for maintaining their Rule 41(e) action was to obtain an order suppressing the seized evidence for purposes of any future hearing or trial. Such an order would be the consequence of prevailing on the Rule 41(e) motion, because the current version of Rule 41(e) provides that "[i]f the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial" (Fed. R. Crim. P. 41(e)). See, *e.g., In re 949 Erie Street, Racine, Wis.,* 824 F.2d at 541; *Standard Drywall, Inc.* v. *United States,* 668 F.2d 156, 158-159 (2d Cir.), cert. denied, 456 U.S. 927 (1982); *Imperial Distributors, Inc.* v. *United States,* 617 F.2d at 895-896; *United States* v. *Glassman,* 533 F.2d 262, 263 (5th Cir. 1976).[13] In sum, the

[13] The Criminal Rules Committee of the Judicial Conference has proposed an amendment to Rule 41(e) that will in all probability avoid

district court's dismissal of petitioners' action therefore was not appealable under any circuit's application of the two-part *DiBella* test.[14] Consequently, this is not an appropriate case for resolving the courts of appeals' differing applications of the second part of the *DiBella* standard.

In any event, further review of petitioners' Rule 41(e) action would be premature. This is not a case "where denial of immediate review would render impossible any review whatsoever of an individual's claims" (*United States* v. *Ryan,* 402 U.S. 530, 533 (1971)). The term of the grand jury is fixed in duration. See 18 U.S.C. 3331; Fed. R. Crim. P. 6(g). If the grand jury does not return an indictment, the property ordinarily would be returned to petitioners. If not, they could initiate a new action for its return. If, on the other hand, the grand jury does return an indictment, a criminal trial would follow shortly thereafter (see 18 U.S.C. 3161 *et seq.*), at which time petitioners could file a motion to suppress evidence under Fed. R. Crim. 12(b)(3) based on the same allegations that are raised in their Rule 41(e) motion. The district court's ruling on that motion would then be reviewable after convic-

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the problems presented in this case. See 109 S. Ct. LXVII-LXX (1988). The proposed amendment will omit the provision in the current rule requiring a suppression order to accompany any order returning property under Rule 41(e). If the proposed Rule is adopted, it will discourage the practice of filing preindictment motions under Rule 41(e), because the true purpose underlying many of those motions—to obtain suppression of the evidence—will no longer be a part of the relief granted to a successful movant.

[14] Petitioners further contend (Pet. 15-17) that the court of appeals' decision conflicts with *Perlman* v. *United States,* 247 U.S. 7 (1918), *Burdeau* v. *McDowell,* 256 U.S. 465 (1921), and *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344 (1931). That asserted conflict is illusory because none of those decisions involved a district court's consideration of a Rule 41(e) motion where the movant was subject to a pending grand jury investigation.

tion. See *United States* v. *Furina,* 707 F.2d 82, 84 (3d Cir. 1983); *Standard Drywall, Inc.* v. *United States,* 668 F.2d 156, 158 (2d Cir.), cert. denied, 456 U.S. 927 (1982).

2. Petitioners further contend (Pet. 17-24) that the court of appeals erred in holding that 28 U.S.C. 1331 does not provide district courts with jurisdiction over Rule 41(e) actions. But the court of appeals dismissed petitioners' appeal solely on the ground that the failure to satisfy the two-part *DiBella* test precluded appellate review (Pet. App. A2).[15] For that reason, there is no occasion for this Court to address petitioners' Section 1331 claim, including their subsidiary allegations that the district court erred in requiring them to allege irreparable harm and that the courts below improperly applied the doctrine of "anomalous jurisdiction" (Pet. 21).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JAMES I.K. KNAPP
Acting Assistant Attorney General
ROBERT E. LINDSAY
GAIL BRODFUEHRER
Attorneys

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[15] The court of appeals' statement in passing that the "district court's order here does not rest wholly or even partially on jurisdictional grounds" (Pet. App. A2 n.1) did not constitute a separate ground for dismissing petitioners' appeal under *DiBella*.

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No. 88-1153

The Supreme Court of the United States of America

OCTOBER TERM, 1988

W. W. RODGERS AND SONS PRODUCE, INC.,
W. W. RODGERS AND SONS PROPERTIES, INC.,
W. W. RODGERS AND SONS FRUITS AND VEGETABLES, INC.,
APPLE TRUCKING, INC., LETTUCE INVEST, INC.
AND ROY DOUGLAS RODGERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

ROBERT EDWIN DAVIS

DAVIS, MEADOWS, OWENS, COLLIER & ZACHRY
3700 NCNB Plaza
901 Main Street
Dallas, Texas 75202
(214) 744-3700
Counsel for Petitioners

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. RESPONDENT'S CENTRAL ARGUMENT IN OPPOSITION OF WRIT OF CERTIORARI BASED UPON THE FIRST PRONG OF *DI BELLA V. UNITED STATES* IS INAPPOSITE BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS MADE NO FINDING WITH RESPECT TO THAT ISSUE IN THIS CASE.

Respondent concedes in its Brief in Opposition that there currently exists a split of authority among the

circuit courts of appeals as to whether the government's act of authorizing a grand jury precludes appellate review of a Rule 41(e) order under *Di Bella v. United States*, 369 U.S. 121, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1962). Nevertheless, the government argues that this case does not offer the Court an opportunity to resolve the lower courts' disagreement over the second prong of the *Di Bella* test because, according to Respondent, Petitioners' action fails to satisfy the first prong of *Di Bella* requiring that their Rule 41(e) motion be filed solely for the return of property. Respondent's reliance on and legal analysis of the application of the first prong of the *Di Bella* test is totally without merit in this case. That is indisputable because, very simply, the Court of Appeals made no finding with respect to that issue in either its consideration of, or ruling on, Petitioners' Appeal. *In Re: Search Warrant Issued July 14, 1987*, 857 F.2d 790, No. 88-1355, Slip Op. at 3, Appendix A at A-2 (5th Cir. Sept. 2, 1988).

The various circuit courts of appeals have uniformly held that a determination with respect to the first prong of *Di Bella* can only be made after a review of the pleadings and arguments to determine whether the "primary purpose" and "essential character" of the Rule 41(e) motion is for the return of property or is an attempt to suppress evidence. *Matter of 949 Erie Street, Racine, Wis.*, 824 F.2d 538, 541 (7th Cir. 1987); *In Re Grand Jury Proceedings*, 716 F.2d 493, 495 (8th Cir. 1983); *Angel-Torres v. United States*, 712 F.2d 717, 719 (1st Cir. 1983); *United States v. Furina*, 707 F.2d 82, 84 (3rd Cir. 1983); *United States v. Regional Consulting Services*, 766 F.2d 870, 873 (4th Cir. 1985).

Thus, because the Fifth Circuit's analysis of *Di Bella* was limited solely to the second prong, and the Court of

Appeals did not review the "essential character" of Petitioners' pleadings or arguments with respect to the first prong of *Di Bella*, Writ of Certiorari should be granted to resolve the direct conflict between the circuit courts of appeals with respect to whether the authorization of a federal grand jury constitutes a criminal prosecution *in esse* for purposes of the second prong of *Di Bella*.

II. RESPONDENT ALSO ERRONEOUSLY ARGUES THAT THE FIFTH CIRCUIT COURT OF APPEALS, BY REFUSING TO ADDRESS PETITIONERS' APPEAL, DID NOT DETERMINE WHETHER 28 U.S.C §1331 PROVIDES A DISTRICT COURT WITH FEDERAL QUESTION JURISDICTION OF A RULE 41(e) MOTION.

Respondent also argues that the Fifth Circuit Court of Appeals dismissed Petitioners' appeal solely on the ground that the existence of a federal grand jury precluded appellate review pursuant to the second prong of *Di Bella* and that the Court of Appeals made no holding with respect to 28 U.S.C. §1331. The government plainly misconstrues the action taken by the Fifth Circuit Court of Appeals.

Petitioners asserted two independent jurisdictional bases for their Rule 41(e) motion: (1) federal question jurisdiction pursuant to 28 U.S.C. §1331; and (2) the district court's anomalous jurisdiction. Although the Fifth Circuit Court of Appeals held that the second prong of *Di Bella* precluded appellate review, it also held that the district court's action was not based "wholly or even partially on jurisdictional grounds." *In Re: Search Warrant Issued July 14, 1987*, 857 F.2d 790,

No. 88-1355, Slip Op. at 2, Appendix A at A-2, n. 1 (5th Cir. Sept. 2, 1988).

This erroneous finding is critical because, as the Court of Appeals itself noted in its Opinion, an order with respect to a Rule 41(e) motion is immediately appealable in the Fifth Circuit if the district court denies the motion on jurisdictional grounds and does not render a decision on the merits. *In Re: Search Warrant Issued July 14, 1987*, 857 F.2d 790, No. 88-1355, Slip Op. at 2, Appendix A at A-2 (5th Cir. Sept. 2, 1988). *See also, Richey v. Smith*, 515 F.2d 1239 (5th Cir. 1975).

Thus, the Court of Appeals' erroneous finding that the district court did not dismiss Petitioners' Rule 41(e) motion on jurisdictional grounds was, in fact, an independent basis for dismissing Petitioners' appeal. If the Court of Appeals had correctly determined that the district court dismissed Petitioners' Rule 41(e) motion on jurisdictional grounds, it would not have dismissed Petitioners' appeal in accordance with *Richey v. Smith*, 515 F.2d 1239 (5th Cir. 1975).

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and this Reply Brief, certiorari should be granted in this case. The decision of the Fifth Circuit Court of Appeals is in direct conflict with the decisions of at least four other courts of appeals and is inconsistent with *Di Bella* and other earlier opinions of this Court. If left standing, the decision of the Court of Appeals for the Fifth Circuit will serve to foreclose any effective relief pursuant to Rule 41(e), which is contrary to the intent of both Congress and this Court in adopting Rule 41(e).

Respectfully submitted,

ROBERT EDWIN DAVIS

DAVIS, MEADOWS, OWENS,
COLLIER & ZACHRY
3700 NCNB Plaza
901 Main Street
Dallas, Texas 75202
(214) 744-3700

Counsel for Petitioners